National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

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Sikorsky Aircraft, United Technologies Corp., Case 39-CA-3853

530-8054-0100, 530-8054-7000, 530-8054-9000, 775-3700, 775-8731

This case was submitted for advice as to whether the Union waived its right to bargain concerning the implementation of a no-smoking policy.(1)

FACTS

The Employer and the Union are parties to a collective-bargaining agreement that is effective from February 15, 1987 to February 15, 1990. The management functions clause in that agreement states that the Employer: has and will retain the sole right and responsibility to direct the operations of the Company and in this connection. . . to select and hire employees, including the right to make and apply rules and regulations for production, discipline, efficiency, and safety.

On December 24, 1987, the Employer notified the Union that it intended to implement a no-smoking policy at its 10 facilities in Connecticut and Florida.(2) On February 4, the Employer told the Union that a copy of the new policy would be sent to all employees the next day and that it would take effect on April 11.

In response to requests from the Union, the Employer discussed its proposed no-smoking policy with the Union at a series of meetings from March 14, 1988 to April 29, 1988. Although the Employer made some minor changes in its proposed plan, the Region has concluded that, unless the Union waived its right to bargain about the implementation of a no-smoking policy by agreeing to the language of the Management functions clause quoted above, the Employer violated Section 8(a)(1) and (5) by engaging in direct dealing with employees in the initial formulation of the policy; by entering into negotiations with a fixed position; and by refusing to provide the Union with requested information.(3)

The no-smoking policy was implemented on May 11, 1988, with a grace period for discipline imposed thereunder until August 7, 1988.(4)

ACTION

The language of the Management Functions clause does not constitute a waiver of the Union's right to bargain about the implementation of a no-smoking policy. Accordingly, the Region should issue a Section 8(a)(1) and (5) complaint, absent settlement, on the violations it has determined to be meritorious.

A contractual waiver of the right to bargain about a mandatory subject of bargaining must be clear and unmistakable.(5) It will not be inferred from the inclusion of a broad management rights clause.(6) Where the language is unclear, the Board will examine whether the facts and circumstances surrounding negotiations or the union's past actions provide evidence of the parties' intent. (7) The Board will look to whether the subject was discussed and "consciously yielded." (8) A waiver with respect to one aspect of a mandatory subject does not necessarily mean that the union has waived its rights with respect to any other aspect of that mandatory subject. (9)

In previous cases the Board has examined whether the Management Functions clause at issue herein privileged unilateral action by the Employer at other facilities. In United Technologies, Corp., 287 NLRB No. 16 (1987), the Board found that, by

agreeing to the Management Functions Clause, the union waived its right to bargain over a change in disciplinary practices but not over the creation of new job classifications. In United Technologies Corp. 286 NLRB No. 62 (1987), the Board held that the union had not waived its right to bargain over the wearing of uniforms either by the wording of the Management Functions Clause, the contractual zipper clause or the fact that the union had failed previously to object when a small number of employees had been required to wear uniforms. In United Technologies Corp., Hamilton Standards Division, Case 39-CA-3575 (JD issued June 1, 1988), the Administrative Law Judge found that the language in the Management Functions clause permitting the Employer to "shift schedule and hours of work" privileged a unilateral modification of overtime hours. The Region has filed exceptions to this decision.[(10)]

In the instant case we concluded that a no-smoking policy is not clearly and unmistakably covered by language permitting the Employer to "make and apply rules and regulations for production, discipline, efficiency, and safety." There is no evidence that in including safety matters, the Union intended to waive its rights to bargain over matters affecting the health and welfare of individual employees, as opposed to matters affecting workplace safety in general.[(11)] Similarly, a ban on smoking is not closely enough related to production, discipline or efficiency to have been clearly intended by the parties in drafting such language.

Further, there is nothing in the record to indicate that the parties ever discussed a smoking ban during the prior negotiations or intended to include smoking policies within the rules and regulations the Employer may make. Indeed, the fact that the Employer has never asserted its rights under the Management Functions clause in this context creates a strong inference that there was no such intent. This inference is strengthened by the fact that, as discussed above, the Employer has often relied on a contractual waiver in the past.

Accordingly, we would not find a contractual waiver on the facts of this case.

H.J.D.

**[1] [*FOIA Exemption 5*

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[2] Although Connecticut has a law requiring an employer to designate one or more non-smoking areas in each facility it operates, the Employer has not asserted that it formulated its policy to conform to state law.

[3] These issues were not submitted for advice.

[4] The Employer has never relied upon the Management Functions clause to privilege its implementation of the new policy.

[5] Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983). Ciba-Geigy Pharmaceuticals Division, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3rd Cir. 1983).

[6] Ciba-Geigy, supra at 1017. See also United Technologies Corp., 286 NLRB No. 62 (1987).

[7] Ciba-Geigy, supra at 1017.

[8] Southern Florida Hotel and Motel Assn., 245 NLRB 561 (1979), enfd. as modified 751 F.2d 1571 (11th Cir. 1985).

[9] See, e.g. Challenge-Cook Brothers of Ohio, Inc., 282 NLRB No. 2 (1986), enfd. 127 LRRM 3181 (6th Cir., March 29, 1988) (notwithstanding broad management rights clause which authorized employer to relocate unit work at will, no waiver found regarding employer's obligation to bargain about effects of a relocation decision).

[10] In other cases in which the Employer has relied on the clause to justify its actions, the Region's finding of a waiver has been sustained on appeal. United Technologies Corp., Case 39-CA-1048; United Technologies Corp., Case 39-CA-1902.

[11] Cf. BASF Wyandotte Corp., 278 NLRB 173 (1986) (contractual language according it the right to make safety rules privileged the employer's unilaterally imposed ban on facial hair for

employees required to wear respirators).